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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 1155

BANKERS FARM MORTGAGE CO.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITIONER'S REPLY BRIEF

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L. J. HERNARD,
Of Counsel.

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1. The Government denies liability on account of Farm Loan bonds because Congress did not use the words 'Guaranty', 'promise,' 'make' or surety.' Prior to 1916 Congress did not use any of these words when it created a liability as near as we are able to ascertain. Before 1916 Congress had never attempted to assume a liability of corporations which it authorized. To say a liability can be created by using only certain words would defeat the rule that a liability may be created by implication as well as by expressed promises.

2. The statement that the United States is liable for these bonds was printed on each bond and was in the Act as follows: "Farm Loan bonds shall be deemed and held to be instrumentalities of the Government of the United States."

The Government does not deny that the word 'instrumentality' when referring to a bond is commonly interpreted to be credit instrument. These bonds were certainly made something of the Government. They could not be property of the Government. They must be credit instruments or obligations of the Government. This is not denied.

3. The remarks of Senator Hollis and Representative Moss do not refer to the word 'instrumentality.' These Congressmen do not explain why the word was used or the effect of that word. Their statement is merely of opinion. From the record we do not know whether Representative Moss or Senator Hollis was aware of the fact that these bonds were instrumentalities of the Government. Senator Carter Glass in 1923 also said that the United States was not liable on these bonds but he added the bonds were not instrumentalities of the Government. He there disclosed that the basis of his opinion was upon an erroneous statement of fact (Congressional Record Vol. 64, page 1931). This illustrates the rule that this Court pronounced in numerous decisions prior to 1916 and summarized in the case of *Duplex Printing Press Company* v. *Deering,* 254 U. S. 443, to wit: that debates are not a safe guide and should not be used unless they expressly refer to the word to be construed. Certainly the Public and attorneys had every reason to rely upon the rule set forth in the *Duplex Printing* case in the 1920 period when these bonds were sold.

Legislative history indicates that Congress recognized the liability of the United States for by Sections 30 and 32 (H. R. 3835-73rd Cong. U. S. C. Title 12, Sec. 991—1933) three hundred million dollars was directed by Congress to be used as financial aid to Joint Stock Land Banks so that all of their obligations would be paid. The Joint Stock Land Bank of Milwaukee was under a Government receiver-

ship at that time and could not partake in the financial relief afforded. The other legislation referred to by Counsel clearly indicate that Congress sought to remove all doubt as to liability rather than that Congress denied liability. Since Congressmen from 1923 (64 Congressional Record page 1931) were well informed by Senators Williams, McFadden and McLean that the Public considered Farm Loan bonds to be Government obligations and Congress did nothing to deny this interpretation although Congress did expressly deny liability of obligations of the Federal Intermediate Credit Banks is an acquiescence in the construction taken by purchasers of Farm Loan bonds.

The Legislatures of New Jersey and New York expressly provided that Municipalities were not liable for obligations of the authorized corporation 'Port Authority'. Judge Hand writing for the majority said that the Port Authority was owned and controlled by the Municipalities therefore in fact its obligations were Municipal obligations. Judge Frank dissented saying that the Legislature expressly said that the obligations of Port Authority should not be Municipal obligations therefore they could not be Municipal bonds. This Court affirmed the majority rule without opinion. *Commissioner* v. *Estate of White,* 144 F. (2d) 1019, 323 U. S. 792 (1945).

4. We find nothing in *Emery Fleet Corporations* v. *Western Union,* 275 U. S. 415 to support counsel's claim that Congress can exempt securities of such banks from taxation even though the principal business of such banks is private banking.

McCulloch v. *Maryland* held that because of this Court's construction of the Constitution states were without power to tax a direct activity of the Government and by construction states could tax private activity of the banks chartered by Congress as shares of stock and ownership of

property (see last paragraph). That case clearly held that states are deprived of the right to tax solely from the interpretation of the Constitution. Counsel for the Government claims that Congress has the right to deprive states of the right to tax and interpret the Constitution. To say that the *McCulloch* case is authority for such a claim ignores the principles of our check and balance system of Government as first established by Chief Justice John Marshall in the *Marberry* v. *Madison* case (1 Cranch 137) which pronounced the theory of Alexander Hamilton (Federalist 77) that it was the exclusive power and duty of the Court to construe the Constitution. We do not believe that any of the cases cited by Counsel (page 14) hold that Congress can deprive states of the right to tax a subject matter which this Court has decreed might be taxed by its construction of the Constitution. This Court said obligations of National Banks might be taxed by states. *Clement National Bank* v. *Vermont* (1913), 231 U. S. 120. To say that Congress can deprive states of the right to tax bonds of a Joint Stock Bank is to say that Congress can override this Court's interpretation of the Constitution. Counsel for the Government is urging this Court to abolish our check and balance system of Government. This is a vital issue in this case.

Respectfully submitted,

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